NG HOCK CHENG

v.

PENGARAH AM PENJARA & ORS

FEDERAL COURT, KUALA LUMPUR
MOHD AZMI FCJ
PEH SWEE CHIN FCJ
MOHAMED DZAIDDIN FCJ
[CIVIL APPEAL NO: 01-1-97(A)]
[1997] CLJ JT(19)
27 NOVEMBER 1997

ADMINISTRATIVE LAW: *Exercise of judicial functions - Judicial review - Dismissal of public officer - Whether court has jurisdiction to review suitability of punishment meted out by disciplinary tribunal - Whether court may substitute punishment ordered by disciplinary tribunal with its own measure of punishment*

PUBLIC SERVANTS: *Disciplinary proceedings - Punishment - Dismissal - Whether court may vary or interfere with punishment meted out by disciplinary tribunal of Public Services Commission - Whether court may substitute punishment ordered by disciplinary tribunal with its own measure of punishment*

This was an appeal against the order of the Court of Appeal affirming the decision of the High Court in dismissing the appellant's action for a declaration that his dismissal was void. The appellant was a chief storekeeper of the Prisons Department at Kamunting in Taiping. As it transpired, the appellant had incurred heavy debts and had, therefore, become liable to disciplinary proceedings under the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980. After considering the appellant's representations, the Public Services Commission ('the 2nd respondent') had dismissed the appellant. Before the instant court, the appellant's primary contention was that the punishment meted out by the 2nd respondent was too severe; that he should have been given a punishment lesser than a dismissal. The consequential question of law raised in the instant appeal was whether the courts have the power to interfere with the punishment meted out by the 2nd respondent.

Held:
Per Peh Swee Chin FCJ

[1] A public officer is entitled to impugn any allegation of misconduct made against him by way of judicial review. If he succeeds, any order of punishment, including an order of dismissal, may be declared invalid or void. If he fails, any order of punishment made **remains**, and there should be **no further review** on such order of punishment. To so further review judicially would be against the concept (in the case of an order of dismissal) that there should not, generally, be any employment against the will of an employer or employee.

[1a] Consequently, both the High Court and the Court of Appeal, after having upheld the 2nd respondent's finding of misconduct against the appellant, were right in refusing to judicially review or otherwise interfere with the order of dismissal meted out by the 2nd respondent.

[1b] The disciplinary tribunal of a professional body is the best judge of the seriousness of the misconduct of its members; it would require an exceptional case to enable a court to interfere with its decision in respect of punishment. Likewise, an employer, including a government, is the best person to judge the seriousness of the misconduct of its employees.

[1c] In this respect, the **majority judgment** of the Court of Appeal in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* **could not stand** with the instant decision of the Federal Court. The **dissenting judgment** in *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* was, therefore, right in restating the principle that: the test is not what the Court of Appeal or the High Court thinks should be the appropriate penalty. Whether dismissal or a lesser penalty (like a reduction in rank) was appropriate is not for the court to say. The court must not substitute its own views as to what is the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Ini merupakan rayuan terhadap perintah Mahkamah Rayuan dalam mengesahkan keputusan Mahkamah Tinggi dalam menolak tindakan perayu untuk suatu deklarasi bahawa pembuangan kerjanya adalah terbatal. Perayu merupakan ketua penjaga stor di Jabatan Penjara, Kamunting di Taiping. Menurut yang telah berlaku, perayu telah banyak berhutang, dan oleh kerana itu, telah tertakluk kepada prosiding tatatertib di bawah Perintah Am

(Tingkahlaku dan Tatatertib) (Bab D) Pegawai Am 1980. Setelah mempertimbangkan representasi perayu, Suruhanjaya Perkhidmatan Awam ('responden kedua') telah membuang kerja perayu. Di hadapan mahkamah ini, hujahan utama perayu adalah bahawa hukuman yang dikenakan oleh responden kedua adalah terlalu berat; dan bahawa dia patut diberikan hukuman yang kurang daripada buang kerja sahaja. Persoalan undang-undang yang bangkit dalam rayuan ini adalah samada mahkamah mempunyai kuasa untuk mengusik hukuman yang dikenakan oleh responden kedua.

Diputuskan
Oleh Peh Swee Chin HMP

[1] Seseorang pegawai awam itu adalah berhak mencabar mana-mana pengataan salah laku yang dibuat terhadapnya melalui penyemakan kehakiman. Jikalau dia berjaya, sebarang perintah ataupun hukuman, termasuk perintah pembuangan kerja, boleh diisytiharkan sebagai tak sah ataupun terbatal. Jikalau dia gagal, sebarang perintah hukuman akan dikekalkan, dan tidak seharusnya ada penyemakan selanjutnya berkenaan dengan perintah hukuman tersebut. Untuk menyemak selanjutnya secara kehakiman adalah bertentangan dengan konsep (dalam kes perintah pembuangan kerja) bahawa secara amnya tidak harus adanya penggajian yang bertentangan dengan niat majikan ataupun pekerja.

[1a] Maka, kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan, setelah mengesahkan keputusan responden kedua yang mengatakan bahawa perayu telah salah laku, adalah betul dalam keenggannya menyemak secara kehakiman ataupun dengan cara lain mengusik perintah pembuangan kerja yang dikenakan oleh responden kedua.

[1b] Lembaga tatatertib sesuatu badan profesyen adalah hakim yang sesuai sekali untuk menentukan keseriusan salah laku ahli-ahlinya; ianya memerlukan sesuatu kes yang luarbiasa untuk membolehkan mahkamah mengusik keputusannya berkenaan dengan hukuman. Seperti itu juga, majikan, termasuk kerajaan, adalah yang sesuai sekali untuk menghakimi keseriusan salah laku pekerjanya.

[1c] Dalam hal ini, penghakiman majoriti Mahkamah Rayuan dalam *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* adalah tidak selaras dengan keputusan mahkamah ini iaitu Mahkamah Persekutuan. Penghakiman bertentangan dalam *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* adalah betul dalam menyatakan prinsip bahawa: ujiannya bukannya apa hukuman yang difikirkan wajar oleh Mahkamah Rayuan ataupun Mahkamah Tinggi. Samada pembuangan kerja ataupun hukuman yang kurang daripada itu (seperti pengurangan

dalam jawatan) adalah wajar bukanlah untuk mahkamah menyatakan begitu. Mahkamah tidak boleh menggantikan pendapatnya sendiri berkenaan dengan apa yang difikirkan hukuman yang wajar (untuk salah laku pekerja) dengan pendapat majikan yang berkenaan.

[Rayuan ditolak.]

Cases referred to:

Bolton v. Law Society [1994] 1 WLR 513 ***(dist)***

Mohd Ahmad v. Yang DiPertua Majlis Daerah Jempol, Negeri Sembilan & Anor [1997] 3 CLJ 135 ***(cit)***

Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771 ***(ovrd)***

Legislation referred to:

Federal Constitution, arts. 132, 135

Rules of the Federal Court 1995, r. 47(4)

[Appeal from Court of Appeal; Civil Appeal No: A-01-25-94]

[Editor's note: The judgment of the High Court delivered by Abdul Malik Ishak J was reported in [1995] 2 CLJ 273.]

For the appellant - Gurbachan Singh; M/s Bachan & Kartar

For the respondents - Dato' Abdul Wahab Said; A-G's Chamber's

JUDGMENT

Peh Swee Chin FCJ:

We have earlier dismissed this appeal and indicated we would give our reasons later. We hereby do so now.

The appeal was against the order of the Court of Appeal confirming an order of High Court at Ipoh which had earlier dismissed the appellant's writ action for declarations that his dismissal as a chief store keeper of the Prison Department be declared void; and an enquiry be heard into arrears of salary etc.

Summarising the facts which were not disputed; briefly the appellant joined the government service in 1960 and rose to the rank of chief store keeper at the detention camp at Kamunting, Taiping at the time of his disputed dismissal. According to the appeal, he had incurred heavy debts in trying to assist his father in the latter's bicycle business, that being pursued by creditors, he sought the advice of one Dato' Ibrahim, the head of his department who advised him in effect to present against himself a bankruptcy petition as a debtor for an indebtedness to the tune of more than RM300,000.

It is to be borne in mind that under the former Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 applicable to the present appeal, (and hereafter called the said General Orders), the appellant's indebtedness being more than six times the amount of his monthly salary, the appellant became, *ipso facto*, liable to disciplinary proceeding for reduction in rank or dismissal etc.

For the purpose of the appeal which concerned only a very short legal but important point, it would not be necessary to set out in detail the three charges framed against the appellant, the show-cause letter and his representations in reply. The gist of such representations was that he had served faithfully the Government for 28 years; his indebtedness being due to helping his father, and that he otherwise was of good character.

The rules of natural justice appeared to have been applied and the appellant even admitted in cross-examination that he was given opportunity to answer all charges; that his dismissal was *bona fide* and that his rights were not infringed.

The main contention of the appeal before us was therefore that he should be meted out a lesser punishment than the order of dismissal made by the disciplinary authority in question.

The Public Services Commission, after deliberating on the appellant's representations had dismissed him from service and maintained the order of dismissal after further consideration on an appeal from the appellant. The appellant then launched the present civil suit which was subsequently dismissed as stated earlier. The Court of Appeal unanimously dismissed his appeal from the High Court's decision.

The appellant applied for leave to appeal to the court which granted such leave to appeal limited to one question of law (*vide* r. 47(4) of Rules of the Federal Court 1995), it being as follows.

> Samada Pemohon telah dibuang kerja dengan sah dan samada Mahkamah mempunyai kuasa untuk menyentuh hukuman yang telah diberikan oleh Lembaga Tata Tertib berkenaan.

The said question of law meant in effect as to whether the appellant had been dismissed from public service validly and whether a court had power to interfere with any punishment meted out by the Disciplinary Board. The second part of the said question had of course, reference to the persisted contention of the appellant that he deserved a lesser punishment that the order of dismissal from public service.

On the first part of the said question about whether the appellant was validly dismissed, nothing really turned on this except that a new point was raised for the first time in this appeal before us, it being that of unfair procedure. We disallowed it to be so raised.

On the second part of the said legal question as to whether the court could interfere with the nature of the punishment meted out by the Disciplinary Board, the English case of *Bolton v. Law Society* [1994] 1 WLR 513 was cited for support in the High Court, and in the Court of Appeal, additionally, it considered also *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771.

The instant appeal dealt with a holder of a public office categorised under art. 132 of the Federal Constitution which gives a special protection together with the rules of natural justice and a specially enacted procedure to such a holder. *Bolton* case dealt with disciplinary proceedings conducted by a professional body against its member, and it was therefore distinguishable from the instant appeal though a certain part of its reasoning was of persuasive force as will be seen later. The instant appeal, *inter alia*, very significantly involved a relationship of master and servant which was absent in *Bolton* case. Compendiously, in *Bolton*, a new solicitor disbursed prematurely money received from a building society for the benefit of the intending purchaser, foolishly but without dishonesty in a sale and purchase of land which aborted, full restitution of the actual sum was made.

The disciplinary tribunal convened on complaint and in exercising leniency, directed that he be suspended from practice for two years.

On appeal by Bolton, the Divisional Court while holding that it would require a strong case to interfere with the penalty as the disciplinary committee were the best people to weigh the seriousness of professional misconduct substituted the order of suspension for two years with a fine.

The Court of Appeal of England reaffirmed the principle of a disciplinary tribunal of a professional body being the best persons to judge the seriousness of professional misconduct and that it would require an exceptional case to enable a court to interfere with their decision on the punishment. The said Court of Appeal stated that in view of the lapse of time from the granting of the stay of the order of the disciplinary tribunal until the determination of the appeal, it would be oppressive to reinstate now the order of suspension for two years and the decision of the Divisional Court was therefore confirmed for different reasons.

In *Tan Tek Seng* case, a senior assistant of a primary school was charged in court for misappropriating a sum of RM3,179 being unpaid salary of the school gardener who was absent from duty. Tan had subsequently made good the sum. The conviction and a sentence of six months' imprisonment of the relevant Sessions Court for Tan were varied, on appeal, to a finding of guilt with an order of binding over for good behavior for a period of three years. Disciplinary proceedings were then instituted – where it was decided that he be dismissed from service. Tan then filed a writ action seeking the usual declarations that his dismissal be declared void and invalid; that arrears of salary be determined etc. The action was dismissed by the High Court. On appeal to the Court of Appeal, (quoting here only one of several points decided there, as being relevant to the said question in the instant appeal), it was held in a majority judgement in allowing the appeal that the disciplinary authority must, when deciding what punishment it ought to impose on the particular public servant, act reasonably, and fairly, that if it acted arbitrarily or unfairly or imposed a punishment that was disproportionate to the misconduct, its decision on the punishment was liable to be quashed or set aside. The Court of Appeal then by a majority substituted the order of dismissal in effect with an order that the senior assistant of the primary school be reduced in rank and salary to those of an ordinary teacher.

It was held by the dissenting judge that the court should not substitute its own view as to which was the appropriate penalty for the employee's misconduct, and it was held further whether the punishment should be a dismissal or a lesser penalty like a reduction in rank was not for the court to say.

It should be emphasised in order to avoid confusion, that the said question for which leave to appeal to this court was granted was in truth as to whether the High Court had the jurisdiction or power to vary any penalty imposed by the Public Services Commission as contradistinguished from another related but no longer important question for the purpose of the instant appeal of whether the appellant had or had not been guilty of any misconduct which could render him liable in the first place to any penalty or punishment as provided by the said General Orders.

After the High Court had judicially reviewed and upheld the disciplinary authority's finding of misconduct or breach of any provision of the code of conduct under the said General Orders, in regard to any further and consequential order of punishment or penalty as prescribed by the "General Orders" aforesaid and imposed on the public officer in question, the High Court was right in not judicially reviewing such consequential order of dismissal or otherwise interfering with such order. The Court of Appeal was also right for not interfering with the same for reasons which we will discuss as follows.

A public officer is entitled to impugn any allegation or accusation of any disciplinary breach against him by way of judicial review on the protection given by art. 135 of the Federal Constitution providing that no member of such service shall be dismissed or reduced in rank except (a) only by an authority that appointed him in the first place; and (b) after being given a reasonable opportunity of being heard. He is, in addition, entitled to protection from sufficient compliance with the rules of natural justice and the disciplinary procedure provided therefor, see *Mohd Ahmad v. Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 3 CLJ 135. If the public officer succeeds in so impugning, any order of punishment including an order of dismissal can be declared invalid or void, and such order being so declared void, is deemed not to have been made at all or is deemed to have been only purportedly made previously. But if the public officer fails to so impugn, any order of punishment remains and there should be no further review on such order of punishment.

To so further review judicially would be acting against the concept, in the case of an order of dismissal, that there should not generally be any employment against the will of employer or employee. After all is said and done, persons in the public service categorised under art. 132 of the Federal Constitution are in fact employees.

Then again there is the elementary principle that a court will not normally decree a specific performance of a contract of personal service or its terms thereof. After a court intervenes by judicial review the question of the alleged disciplinary breach, the court should thereafter give due respect to this principle on the question of penalty.

The intervention of the said art. 135 and the rules of natural justice etc. in the case of a public officer is only one of two exceptions to this elementary principle. Please see *Mohd Ahmad (supra)*. It must be borne in mind that when a court declares as void an order of dismissal against a public officer categorised under art. 132 of the Federal Constitution, (see *Mohd Ahmad (supra)*), it does so because the accusation against him on which such an order of dismissal is based, has been found to be invalidly made or conducted, so that the order of dismissal, and for that matter, any other order of penalty is thereby a *non sequitur*. The court in truth is not substituting the order of dismissal with its own measure of punishment and if in the latter case, it would amount to the court forcing the employer/government to still employ him, or specifically enforcing a contract of personal service.

It cannot be denied further that the disciplining of a public officer by his department head, is part of the function of the executive branch of the government and any usurpation by a court will be viewed with something very much more than disfavour even though the judiciary is the judicial branch of the government as well as an institution which belongs to the people. To repeat, a court intervenes only on the nature and manner of accusation against a public officer as distinct from a consequential punishment as explained above.

Just like a professional body being the best tribunal to judge the seriousness of misconduct of its members, in a similar vein, an employer, including a government is the best person to judge similarly the seriousness of misconduct of an employee.

Thus, we are of the opinion that on the narrow point in question, the majority judgment in *Tan Tek Seng (supra)* cannot stand though we express our agreement with the minority judgment on the same narrow point.

We once again revert to the instant appeal. Likewise we did not interfere with the order of dismissal despite what were said to be mitigating circumstances. The appellant would have to leave for greener pastures. We therefore dismissed the appeal with costs.

Reported by Gan Peng Chiang

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